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In The

Supreme Court of the United States

October Term, 1997

HOME SAVINGS OF AMERICA, FSB,

Petitioner,

vs.

MARCELLA T. MAYNARD,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal law – the Home Owners' Loan Act and its implementing regulations – preempts a federal thrift employee's state-law wrongful-discharge claim, where the claim is based on an alleged implied employment contract forbidden by federal law.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The only parties to this action are plaintiff/respondent Marcella T. Maynard and defendant/petitioner Home Savings of America, FSB, a federal savings bank. Home Savings of America is a wholly-owned subsidiary of H.F. Ahmanson & Company. There are no subsidiaries of Home Savings and H.F. Ahmanson (other than wholly-owned subsidiaries). (Washington Mutual, Inc., a publicly traded thrift holding company, and H.F. Ahmanson have publicly announced a definitive agreement to merge.)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

I. THE RULE ANNOUNCED IN CALIFORNIA IMPEDES THE U.S. GOVERNMENT'S EXERCISE OF ITS REGULATORY RESPONSIBILITIES OVER THE THRIFT INDUSTRY 6

A. The Federal Regulations Governing Savings And Loan Associations Expressly Provide For Preemption Of State Law 7

B. The OTS Regulations Preempt The California Law Of Implied Employment Contracts 9

1. The OTS regulations specify precisely what is and what is not an enforceable employment contract 10

2. California and many other states recognize implied employment contracts that are unwritten and sometimes even ephemeral 12

3. The federal regulations preempt claims based on implied employment contracts 15

TABLE OF CONTENTS – Continued

Page

II. THERE IS A CONFLICT: COURTS OF OTHER STATES, AND FEDERAL COURTS, HOLD PREEMPTED THE KIND OF CLAIM AT ISSUE HERE 18

A. State And Federal Courts Throughout The Country Disagree With The California Cases 18

B. The Ninth Circuit Holds Preempted The Kind Of Claim At Issue Here, Creating A Forum-Shopping Problem 21

III. THE COURT SHOULD GRANT REVIEW BECAUSE, OTHERWISE, THE FEDERAL QUESTION OF PREEMPTION WILL ESCAPE ANY FEDERAL-COURT REVIEW 23

CONCLUSION 25

APPENDIX

Opinion of the California Court of Appeal .....App. 1

Order of the California Supreme Court denying review .....App. 9

Earlier Opinion of the California Court of Appeal .....App. 10

Earlier Order of the California Supreme Court denying review .....App. 15

Applicable statutes and regulations .....App. 16

TABLE OF AUTHORITIES

Page(s)

CASES

Alegria v. Idaho First National Bank, 111 Idaho 314, 723 P.2d 858 (1986) 21

Aronson v. Resolution Trust Corp., 38 F.3d 1110 (9th Cir. 1994) 21

Berry v. Am. Fed. Sav., 730 P.2d 905 (Colo. Ct. App. 1986) 20

Bianco v. H.F. Ahmanson & Co., 897 F. Supp. 433 (C.D. Cal. 1995) 21, 22

Buckholz v. Fed. Deposit Insurance Corp., 129 F.3d 868 (6th Cir. 1997) 21

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 23

City National Bank v. Brown, 599 So. 2d 787 (La. Ct. App.), *cert. denied*, 604 So. 2d 999 (La. 1992) 21

City of New York v. FCC, 486 U.S. 57 (1988) 9

Cole v. Carteret Sav. Bank, 224 N.J. Super. 446, 540 A.2d 923 (1988) 19, 24

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 18

Dynan v. Rocky Mountain Fed. Sav. & Loan, 792 P.2d 631 (Wyo. 1990) 20

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 22

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 2, 6, 7, 8, 9, 15

First Gibraltar Bank v. Morales, 19 F.3d 1032 (5th Cir.), *cert. denied*, 513 U.S. 876 (1994) 7

TABLE OF AUTHORITIES – Continued

Page(s)

Fleischer v. Resolution Trust Corp., 882 F. Supp. 1010 (D. Kan. 1995), *aff'd*, 113 F.3d 168 (10th Cir. 1996) 18, 19

Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988) 13

Gilbert v. Durand Glass Manufacturing Co., Inc., 258 N.J. Super. 320, 609 A.2d 517 (1992) 14

Glendale Fed. Sav. & Loan Ass'n v. Fox, 459 F. Supp. 903 (C.D. Cal. 1978) 9, 11, 12

Gonzales v. MetPath, Inc., 214 Cal. App. 3d 422, 262 Cal. Rptr. 654 (1989) 14

Hall v. Great Western Bank, 231 Cal. App. 3d 713, 282 Cal. Rptr. 640 (1991) 4, 19, 24

Hawkins v. Peoples Fed. Sav. & Loan Ass'n, 155 Mich. App. 237, 399 N.W.2d 484 (1986) 20

Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707 (1985) 6, 7

Honig v. Financial Corp. of America, 6 Cal. App. 4th 960, 7 Cal. Rptr. 2d 922 (1992) 4

Hrechorovich v. Harbor Hospital Center, Inc., 93 Md. App. 772, 614 A.2d 1021 (1992), *cert. denied*, 624 A.2d 490 (1993) 14

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) 2

Kaiser v. Dixon, 127 Ill. App. 3d 251, 468 N.E.2d 822 (1984) 14

Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984) 14

Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 9

TABLE OF AUTHORITIES – Continued

Page(s)

Mers v. Dispatch Printing Co., 39 Ohio App. 3d 99, 483 N.E.2d 150 (1985) 14

Paris v. Northeast Sav. Ass'n, No. CV 910398144, 1994 Conn. Super. LEXIS 1412 (June 1, 1994)..... 24

Pena v. Downey Sav. & Loan Ass'n, 929 F. Supp. 1308 (C.D. Cal. 1996) 22, 23, 24

Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981)..... 13

Rivet v. Regions Bank, ___ U.S. ___, 118 S. Ct. 921 (1998) 23

Sargent v. Central National Bank & Trust Co., 809 P.2d 1298 (Okla. Sup. Ct. 1991) 21

Sholer v. Security Fed. Sav. & Loan Ass'n, 736 F. Supp. 1083 (D.N.M. 1990).....19, 20

Soules v. Cadam Inc., 2 Cal. App. 4th 390, 3 Cal. Rptr. 2d 6 (1991) 13

St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) 18

Thomka v. Financial Corp. of America, 15 Cal. App. 4th 877, 19 Cal. Rptr. 2d 382 (1993)..... 4

Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980)..... 14

Weber v. First Fed. Bank, 523 N.W.2d 720 (S.D. 1994) 19

Wing v. JMB Property Mgmt. Corp., 714 P.2d 916 (Colo. Ct. App. 1985)..... 14

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES AND REGULATORY MATERIALS

12 U.S.C. §§ 1462a-1464 ..... 3, 7, 8

28 U.S.C. § 1257(a) 1, 2

39 Fed. Reg. 28609, 28610 (1974) (codified at 12 C.F.R. § 545.25-1(a)) 11, 15

47 Fed. Reg. 17471 (1982) 11

12 C.F.R. § 545.2 8

12 C.F.R. § 563.39 ..... *passim*

Office of Thrift Supervision, Executive Compensation & Employment Contracts, ¶ 27,107 (March 5, 1993) 11

Office of Thrift Supervision, Letter Rule No. 9/CS-46 United States Supervision 1990 OTS LEXIS 53 (July 3, 1990) 16

UNITED STATES CONSTITUTION

Article VI 6

RULES OF COURT

Sup. Ct. R. 10.1(b) 18

Sup. Ct. R. 10.1(c) 18

Sup. Ct. R. 13.1 1

Cal. R. Ct. 29.2 5

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioner Home Savings of America, FSB, respectfully petitions this Court for a writ of *certiorari* to review the decision of the Court of Appeal of the State of California, Second Appellate District.

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal was filed on October 16, 1997, and is reproduced in the Appendix beginning at page App. 1. The California Supreme Court denied the discretionary petition for review in an unpublished order dated January 14, 1998. That order is reproduced in the Appendix at page App. 9. An earlier, interlocutory unpublished opinion of the California Court of Appeal filed on February 17, 1994, is reproduced in the Appendix beginning at page App. 10.

JURISDICTION

The judgment of the court of appeal was entered on October 16, 1997. Home Savings' timely petition for review to the California Supreme Court was denied on January 14, 1998. The instant petition for *certiorari* is filed within 90 days of that date. Sup. Ct. R. 13.1.[1]

[1] This Court's review of the decision of the California Court of Appeal is proper under 28 U.S.C. § 1257(a) because the California Supreme Court denied discretionary review. *E.g.*,

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The applicable statutes and regulations are set forth beginning at page App. 16 of the Appendix.

STATEMENT

This is a straightforward case of preemption. California and some other states recognize "implied" employment contracts arising from, *inter alia*, the employee's length of service and satisfactory job performance. No formal employment contract – indeed, no written document at all – is required.

Federal law, however, regulates the operations of federally chartered thrift institutions. As this Court has held, federal law controls " 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.' " *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 146 (1982) (citation omitted). Federal law prohibits, for federal thrift employees, exactly the implied contracts that California law would recognize. Indeed, federal law prohibits *all* employment contracts for federal thrift employees, except those that

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Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678 n.1 (1968) (where the state court of last resort denies discretionary review, appeal to the Supreme Court is permissible from the judgment of the intermediate state court).

are (i) in writing, and (ii) approved by the thrift's board of directors. The state law of "implied" employment contracts thus conflicts with federal law.

In these circumstances, state law must yield. Yet the California state court in the instant case recognized an implied employment contract in derogation of federal law. Because the California court's decision undermines an important U.S. government regulatory interest, and because it conflicts with the decisions of the courts of several other states and every federal court to address the issue in a published decision, this Court should grant *certiorari*.

This case is a particularly desirable one to review because it arises on undisputed – indeed, stipulated – facts. Petitioner Home Savings is a federal savings bank covered by the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1462 *et seq.*, and is subject to federal regulations promulgated by the Office of Thrift Supervision (OTS). (App. 11.) Respondent Marcella T. Maynard, a bank officer, was terminated from her employment in October 1991. (App. 2.) The termination occurred after the branch for which Maynard was responsible sustained a $280,000 loss attributable to its failure to adhere to proper cash-handling procedures. Home Savings' board of directors ratified Maynard's termination by resolution adopted on October 22, 1991. At no time during Maynard's employment with Home Savings did she have a written, board-approved employment contract. (App. 2.)

Maynard sued Home Savings on May 15, 1992, alleging that her termination violated an "implied contract" that, she said, guaranteed her employment for the balance

of her working life. The "contract," Maynard alleged, derived from her years of service and purportedly competent job performance. She alleged only contract claims; she did not allege discrimination, or that Home Savings terminated her for any other improper motive.[2]

The trial court granted Home Savings' motion for summary judgment, finding that Maynard's claims were preempted by federal law. (App. 11.) In an unpublished opinion filed on February 17, 1994 and reproduced in the Appendix beginning at page App. 10, the California Court of Appeal reversed the trial court's ruling. The court based its decision, without further analysis, on earlier California cases[3] which had held

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[2] Because only contract-based claims are alleged, this Court need not decide to what extent, if at all, the OTS regulations preempt state-law claims other than those for breach of contract. Home Savings assumes for purposes of this case that different rules may well apply to persons who are terminated for a reason offensive to public policy, such as discrimination, refusing to commit a crime, or reporting wrongdoing to appropriate public officials. The instant case involves no such claim – only a claim that, by reason of her length of service and job performance, Maynard somehow had acquired an ephemeral implied-contract right.

[3] *Thomka v. Financial Corp. of America*, 15 Cal. App. 4th 877, 885-87, 19 Cal. Rptr. 2d 382 (1993) (plaintiff's state-law claim for wrongful discharge in violation of public policy was not preempted); *Honig v. Financial Corp. of America*, 6 Cal. App. 4th 960, 964-65, 7 Cal. Rptr. 2d 922 (1992) (plaintiff's state-law claim for wrongful discharge was not preempted); and *Hall v. Great Western Bank*, 231 Cal. App. 3d 713, 718, 282 Cal. Rptr. 640 (1991) (plaintiff's state-law claim for wrongful discharge in violation of public policy was not preempted).

that federal law does not preempt state implied-contract claims.[4]

On remand, the parties agreed that the case was one appropriate for resolution as a matter of law; the relevant facts were undisputed, and controlling questions of law existed. Since the court of appeal's preemption decision was – so far as the trial court was concerned – law of the case, the parties chose to conserve judicial time and resources by entering into a Stipulated Judgment resolving all issues in the case and preserving Home Savings' right to appeal the controlling legal question presented.

On further appeal, the California Court of Appeal elected to adhere to its prior evaluation of the preemption issue, citing the law-of-the-case doctrine. The California Supreme Court denied review on January 14, 1998. (App. 9.)[5] This timely petition followed. *See supra* note 1.

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[4] Following the California Supreme Court's discretionary denial of Home Savings' petition for review, Home Savings petitioned for a writ of *certiorari* from this Court, notwithstanding the absence of a final judgment. Perhaps for that reason, this Court denied *certiorari* on October 11, 1994.

[5] There is no conflict in the *California* cases; thus, it is unremarkable that the California Supreme Court declined to grant discretionary review. *See* Cal. R. Ct. 29.2 (citing an *intra*-state conflict as a chief reason for granting review). As noted below, there is a conflict, but the conflict is between the California decisions and those from several other states and every published federal decision to address the preemption issue.

REASONS FOR GRANTING THE PETITION

The Court should grant review for two reasons. First, the decision below undermines an important regulatory interest of the United States government. Second, the instant case, and the other California cases on which it relies, conflict with those of several other states, and with every published federal decision to consider the issue. This Court should grant review to resolve the conflict and to bring uniformity to the various state and federal court rulings on this issue.

I. THE RULE ANNOUNCED IN CALIFORNIA IMPEDES THE U.S. GOVERNMENT'S EXERCISE OF ITS REGULATORY RESPONSIBILITIES OVER THE THRIFT INDUSTRY

Under the Supremacy Clause of the United States Constitution, federal law of course preempts all conflicting state laws. U.S. Const. art. VI; *see, e.g., Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712 (1985). Preemption arises where Congress' express language indicates an intent to supersede state law, or where the scheme of federal regulation is " 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " *de la Cuesta*, 458 U.S. at 154 (citation omitted). Even where Congress' intent to preclude state regulation is neither expressly stated nor inferred from a pervasive scheme of federal regulations, state law is preempted to the extent it actually conflicts with the federal law. *Id.* State law is deemed to be conflicting with federal law (i) when compliance with both state and federal law is impossible, or (ii) when state law

" 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Hillsborough*, 471 U.S. at 714 (citation omitted).

In the instant case, preemption obtains. Congress has exercised its power to control completely the thrift industry, and the state implied-contract law in question conflicts directly with federal law.

A. The Federal Regulations Governing Savings And Loan Associations Expressly Provide For Preemption Of State Law.

More than 60 years ago, during the Great Depression, Congress recognized that the financial health of savings and loan associations was a critical federal interest. To ensure that these institutions remained financially viable, Congress enacted the HOLA as a " 'radical and comprehensive response to the inadequacies of the existing state systems.' " *de la Cuesta*, 458 U.S. at 161 (citation omitted). The HOLA provided for the creation of a system of federal savings institutions regulated by a single federal agency, known today as the OTS. 12 U.S.C. §§ 1462a-1464; *see de la Cuesta*, 458 U.S. at 160-61.[6]

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[6] The original federal agency created by the HOLA was the Federal Home Loan Bank Board (FHLBB). In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which amended the HOLA by replacing the FHLBB with the OTS. *See, e.g., First Gibraltar Bank v. Morales*, 19 F.3d 1032, 1041 (5th Cir.), *cert. denied*, 513 U.S. 876 (1994). This petition will refer to the OTS and its predecessor collectively as "OTS."

OTS regulations preempt state law. In Section 5(a) of the HOLA, Congress expressly granted the OTS plenary authority to regulate all aspects of the thrift industry:

> [The OTS] is authorized, under such regulations as [it] may prescribe, to provide for the . . . operation and regulation of . . . Federal savings associations. . . .

12 U.S.C. § 1464(a).

The OTS exercised the authority delegated to it under the HOLA. It promulgated 12 C.F.R. § 545.2. The plain language of this section completely and exclusively controls all aspects of the operation of institutions within the thrift industry:

> The[se] regulations . . . are promulgated pursuant to the plenary and exclusive authority of the [OTS] to *regulate all aspects of the operations of Federal savings associations*, as set forth in section 5(a) of the [Home Owners' Loan] Act. This exercise of [OTS] authority is *preemptive of any state law purporting to address the subject* of the operations of a Federal savings association.

12 C.F.R. § 545.2 (emphasis added).

The preemptive force of the regulations has been widely acknowledged. As this Court explained in *de la Cuesta*, federal regulations promulgated under the HOLA have the same preemptive force as federal statutes and thus preempt all conflicting state laws. 458 U.S. at 162-63.[7] The HOLA, the Court noted, reflected Congress'

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[7] It is well established, of course, that federal regulations can preempt state law, where a federal agency acts within the

recognition of "the inadequacies of existing state systems"; Congress decreed that federal law would control "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *Id.* at 160, 146 (citation omitted); *accord, e.g., Glendale Fed. Sav. & Loan Ass'n v. Fox*, 459 F. Supp. 903, 910 (C.D. Cal. 1978) (when a regulation is promulgated governing an aspect of the operation of federal savings associations, "that regulation governs exclusively and preempts any attempt by a state to regulate in that area").

B. The OTS Regulations Preempt The California Law Of Implied Employment Contracts.

In the instant case, respondent Maynard claimed an "implied" employment contract that she would not be discharged from her job except for proven good cause. She did not allege a written contract, much less one that was board-approved. She alleged only that she thought her job was "secure" based on her length of service, her job performance, and possibly oblique remarks made by her supervisor. California, like some other states, recognizes implied-in-fact employment contracts of this kind. The OTS regulations, however, prohibit – and preempt claims based on – the kind of contract alleged here.

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scope of authority delegated by Congress. *E.g., City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

1. The OTS regulations specify precisely what is and what is not an enforceable employment contract.

One of Congress' primary regulatory objectives was to ensure that thrifts – and the federal regulators that sometimes have to take them over, at taxpayer expense – are not saddled with unknown, indeterminate and possibly improvident obligations. Congress and the OTS sought to make the thrifts' boards of directors more accountable for the thrifts' fiscal health. One aspect of such accountability, the OTS determined, is that each thrift's board should be able to determine the existence and nature of the institution's obligations under employment contracts. Accordingly, the OTS promulgated 12 C.F.R. § 563.39, which specifies that a savings association is powerless to enter into any employment contract which is not (i) in writing, and (ii) approved by the association's board of directors.

Section 563.39 of the OTS regulations specifically forbids implied-in-fact employment contracts; the regulation even forbids written contracts that lack board approval:

> A savings association may enter into an employment contract with its officers and other employees *only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors.* . . . Each employment contract shall provide . . . [t]he association's board of directors may terminate the officer or employee's employment *at any time.* . . .

12 C.F.R. § 563.39 (emphasis added).

The evolution of Section 563.39 further underscores the case for preemption. When a predecessor regulation was adopted in 1974, the key requirement was only that a contract receive "specific approval of [the thrift's] board of directors." 39 Fed. Reg. 28609, 28610 (1974) (codified at 12 C.F.R. § 545.25-1(a)). Thus, while board approval was required, there then was no requirement of a writing.

By 1982, however, the regulators had become even more concerned about the potential abuse inherent in "long-term employment contracts and fringe benefit contracts for . . . officers." 47 Fed. Reg. 17471 (1982). The OTS's predecessor agency effected a number of changes, including revising § 563.39(a) to provide that *"[a]ll employment contracts shall be in writing* and shall be approved specifically by an institution's board of directors." *Id.* at 17472 (emphasis added).

Even under the 1974 version, an "implied" contract was forbidden, since by definition it lacked "specific [board] approval." But the express addition of the requirement of a writing emphasizes that an implied contract simply is not cognizable.

Since 1982, the OTS (and its predecessor) has established even stricter rules for written, board-approved contracts. Its current guidelines require the board of directors of each association to review all employment contracts annually; employment contracts "may only be renewed or extended upon explicit review and approval by the board of directors." OTS Reg. Bull. 27a, *Executive Compensation & Employment Contracts*, ¶ 27,107 (March 5, 1993). (Plainly, therefore, the board of directors cannot satisfy this obligation with respect to ephemeral

"implied" employment contracts; there is nothing to "review" or "approv[e]."

And even *written, board-approved* contracts are restricted in duration. The OTS prohibits

> [c]ontracts that contain automatic renewals or extensions of the contract without providing explicit review and approval by the board of directors;

and further prohibits

> *[c]ontracts that provide for an excessive term.* As a general matter, a one-year term is not objectionable; *a term exceeding three years is generally objectionable.*

Id. (emphasis added). If a written, board-approved, three-year contract is condemned, *a fortiori* so is an "implied" contract for an employee's working life, such as that claimed by Maynard here.

2. California and many other states recognize implied employment contracts that are unwritten and sometimes even ephemeral.

The most significant development in employment law over the past decade is the explosion of state-law wrongful-discharge suits. In almost every state the "employment at will" doctrine has been eroded by exceptions. One of the most common of these exceptions is the doctrine of implied employment contracts. In many states an employment contract arises from factors such as length of service, favorable performance reviews,

employee handbooks, the existence of internal disciplinary-review procedures, and the like. In the seminal California case, *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), the court explained that "an implied-in-fact promise for . . . continued employment" may be inferred from:

> the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.

Id. at 327 (footnotes omitted). In such cases, the contract (as a matter of state law) need not be in writing.[8]

In California, the existence *vel non* of an implied contract usually presents a jury question. *E.g.*, *Foley*, 47 Cal. 3d at 682 ("plaintiff has pleaded facts which, if proved, may be sufficient for a jury to find an implied-in-fact contract limiting defendant's right to discharge him"); *Soules v. Cadam, Inc.*, 2 Cal. App. 4th 390, 400, 3 Cal. Rptr. 2d 6 (1991) (plaintiff's declaration alleging "length of plaintiff's service, promotions, salary increases, and superior performance ratings . . . was sufficient to raise a triable issue regarding an implied

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[8] Indeed, the statute of frauds – the normal protection against hard-to-disprove claims of unwritten contractual obligations – has been held inapplicable in such cases. *E.g.*, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 671-75, 254 Cal. Rptr. 211 (1988) (the statute of frauds does not apply because an implied contract for permanent employment theoretically could be performed within one year – if, for example, the employee chose to quit or died).

agreement that plaintiff would not be discharged except for good cause"). The consequence is that, in states where implied employment contracts can arise, an employer may be put to the risks and expense of defending before juries contract claims in cases where the employer did not know that any contract existed, much less what its terms were. Unless such cases are taken out of the hands of the jury, the jury becomes a "personnel review board" passing on, after the fact, the wisdom of business judgments made by private enterprises. *Gonzales v. MetPath, Inc.*, 214 Cal. App. 3d 422, 428, 262 Cal. Rptr. 654 (1989).

Although the law of implied employment contracts is perhaps most developed in California, the phenomenon is national in scope. Many states recognize the implied employment contract doctrine, including (for example) Arizona,[9] Colorado,[10] Illinois,[11] Maryland,[12] Michigan,[13] New Jersey[14] and Ohio.[15]

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[9] *E.g., Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984).

[10] *E.g., Wing v. JMB Property Mgmt. Corp.*, 714 P.2d 916 (Colo. Ct. App. 1985).

[11] *E.g., Kaiser v. Dixon*, 127 Ill. App. 3d 251, 468 N.E.2d 822 (1984).

[12] *E.g., Hrechorovich v. Harbor Hosp. Center, Inc.*, 93 Md. App. 772, 614 A.2d 1021 (1992), *cert. denied*, 624 A.2d 490 (1993).

[13] *E.g., Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980).

[14] *E.g., Gilbert v. Durand Glass Mfg. Co., Inc.*, 258 N.J. Super. 320, 609 A.2d 517 (1992).

[15] *E.g., Mers v. Dispatch Printing Co.*, 39 Ohio App. 3d 99, 483 N.E.2d 150, 153-54 (1985).

It is true, of course, that – in general – it is up to each state to decide for itself whether to foster the proliferation of state-law implied employment-contract claims. But where state law conflicts with federal law, state law must yield.[16] That is the case here.

3. The federal regulations preempt claims based on implied employment contracts.

Federal law helps assure that thrifts do not enter into employment contracts that would be unsafe or unsound.[17] The regulatory device chosen in 12 C.F.R. § 563.39 was to prohibit implied employment contracts; indeed, even *written* contracts are prohibited unless they are board-approved. In the instant case, Maynard stipulated that she never had a written, much less board-approved, contract. (App. 2.) Maynard's contract claim

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[16] This is true regardless of the relative interest of the state in applying its own law: " 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *de la Cuesta*, 485 U.S. at 153 (citation omitted).

[17] The regulatory history indicates that OTS perceived the potential risk inherent in employment contracts:

> An employment contract would be an unsafe or unsound practice if it . . . could materially interfere with the exercise by the members of the board of directors of their duty or discretion . . . as to the employment or termination of employment of an officer or employee of the institution.

39 Fed. Reg. 28,610 (1974).

rests only on a series of circumstances and oblique statements that, she says, taken together, gave her reason to believe that her job was secure. Although in some circumstances California law may recognize such statements as enforceable contracts, 12 C.F.R. § 563.39 plainly does not.

Indeed, in a published opinion letter, the OTS expressly stated that implied employment contract claims are preempted. In response to a written inquiry, the OTS explained that one cannot circumvent the rules by bypassing the board:

> The purpose of the regulation [§ 563.39] is generally to protect institutions from unsafe and unsound practices arising in connection with employment relationships. In order to prevent circumvention of the intent of this regulation, it is our belief that *its provisions should apply whe[re] there is [but] a . . . tacit employment contractual relationship. . . . [W]e are further of the view that the requirement in Section 12 C.F.R. 563.39(b)(1) that . . . the officer or employee's employment be terminated "at any time" would super[s]ede any contrary and conflicting state law provisions. . . .*

Ltr. Rul. No. 90/CS-46, United States Office of Thrift Supervision, 1990 OTS LEXIS 53, at *1-2 (July 3, 1990) (emphasis added).[18]

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[18] Neither the California Court of Appeal panel in the instant case, nor the state courts that have reached a similar conclusion, have even cited, much less purported to distinguish, the OTS opinion and the other regulatory materials cited herein.

A hypothetical, suggested by some of the abuses of the savings and loan scandal, helps illustrate the significant regulatory interest in preemption. Consider Executive A, a high official of the hypothetical thrift. He or she enters into oral contracts with cronies, Executives B through Z, guaranteeing them employment, at lush salaries and benefits, for their working lives. The contracts never would be approved by the thrift's outside directors, so they remain secret pacts. Perhaps the thrift then fails; or, perhaps, the OTS examiners detect and set out to clean up earlier unsavory and unsound practices. Either way, under the California court's analysis, the deals are enforceable. In the former case, the taxpayer foots the bill; even in the latter case, the OTS expends its limited regulatory resources on a problem that never should have arisen.

While there is no suggestion of cronyism or self-dealing in the instant case, it and others like it harbor an even greater risk to the public. At least in the hypothetical, the beneficiaries of the contracts claimed an express oral agreement with a senior officer. Maynard and others like her make no such claim; Maynard, for example, has conjured up her "contract" largely out of a few years of service and a few earlier pats on the back from relatively low-level supervisors. If Maynard can claim a job guarantee for her entire working life, so too could many other thrift employees. Result: a run – of lawsuits – on the bank.

California is, of course, free in general to decide what is and what is not a contract. Where, however (as here),

California contract law places taxpayer-guaranteed institutions at risk, Congress and the OTS are entitled to dictate – and they have dictated – a federal rule of law.

II. THERE IS A CONFLICT: COURTS OF OTHER STATES, AND FEDERAL COURTS, HOLD PREEMPTED THE KIND OF CLAIM AT ISSUE HERE

Review by this Court is especially important because state and federal courts have reached conflicting results with respect to the important federal preemption question presented. *E.g.*, Sup. Ct. R. 10.1(b), (c); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 n.1 (1985); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.10 (1981).

A. State And Federal Courts Throughout The Country Disagree With The California Cases.

The California Court of Appeal in the instant case acknowledged that it was departing from the rule announced by other state courts. The court said: "While respondent cites this court to several cases from other jurisdictions which have concluded that [12 C.F.R. § 563.39] preempts state law. . . . [r]espondent has failed to persuade us [to follow them]." (App. 11-12.)

Given the crystalline language of § 563.39, it comes as no surprise that multiple courts have indeed confirmed that § 563.39 preempts state-law implied-contract claims. In *Fleischer v. Resolution Trust Corp.*, 882 F. Supp. 1010 (D. Kan. 1995), *aff'd*, 113 F.3d 168 (10th Cir. 1996), decided after the court of appeal's initial decision below, the court

rejected plaintiffs' claim that they were entitled to benefits under an unwritten contract with their employer, a savings and loan association. Noting that "the clear and unequivocal language of 12 C.F.R. § 563.39(a) is dispositive here," the court held that "[b]ecause [plaintiffs'] agreements were not in writing, their agreements are unenforceable." *Id.* at 1014.

This same reasoning animated the South Dakota Supreme Court's decision in *Weber v. First Fed. Bank*, 523 N.W.2d 720 (S.D. 1994), also decided after the court of appeal's initial decision below. The *Weber* court affirmed a trial court ruling that a bank officer's implied-contract claim was preempted by 12 C.F.R. § 563.39. The Court held that, given the clear preemption language contained in the OTS regulations at issue here, "[f]ederal supremacy reigns," and therefore no implied contract claim may be brought by an employee of a federal thrift. *Id.* at 722. In so holding, the *Weber* court expressly rejected by name the line of authority which has been adopted by the California courts, including the court of appeal in this case.[19]

Other courts around the country concur. In *Sholer v. Security Fed. Sav. & Loan Ass'n*, 736 F. Supp. 1083 (D.N.M. 1990), for example, a former bank officer sued a federal savings and loan for breach of an alleged implied contract of employment. Like Maynard here, the plaintiff in *Sholer* lacked a written, board-approved contract. The court granted the bank's motion for summary judgment even

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[19] The court specifically rejected the reasoning set forth in *Hall*, 231 Cal. App. 3d at 718, and *Cole v. Carteret Sav. Bank*, 224 N.J. Super. 446, 540 A.2d 923, 925 (1988). *See Weber*, 523 N.W.2d at 722.

though New Mexico law (like California law) recognized oral and even implied employment contracts. The court explained that state law was preempted because:

> The presumption is . . . established [by § 563.39] that, *absent a written employment contract, the defendant could not have entered into any specific employment relationship* with the plaintiff which exceeded the scope of an at-will employment relationship.

Id. at 1085 (emphasis added).

Similarly, in *Berry v. Am. Fed. Sav.*, 730 P.2d 905, 906-07 (Colo. Ct. App. 1986), a former employee attempted to allege a claim based on an implied employment contract. Colorado law, like that of California, recognizes such contracts. But the plaintiff in *Berry* lacked a written, board-approved employment contract. The state trial court therefore granted summary judgment, and the Colorado Court of Appeals affirmed, based on the preemptive force of § 563.39.

The Michigan Court of Appeals came to the same conclusion in *Hawkins v. Peoples Fed. Sav. & Loan Ass'n*, 155 Mich. App. 237, 399 N.W.2d 484 (1986). In *Hawkins*, a federal thrift employee alleged an implied contract, and the thrift defended by invoking the preemptive effect of the regulations at issue here. The *Hawkins* court agreed, reasoning: "The regulation adopted by the [OTS] is authorized by the [HOLA] and has the same pre-emptive effect on state law as a federal statute." 399 N.W.2d at 486. *Cf. Dynan v. Rocky Mountain Fed. Sav. & Loan*, 792 P.2d 631, 639 (Wyo. 1990) (although "our rules of state law might justify [plaintiff's legal position] . . . , that rule could not control if in conflict with a provision of the

federal regulations"); *Buckholz v. Fed. Deposit Insurance Corp.*, 129 F.3d 868, 869 (6th Cir. 1997) (plaintiff's contract claims were barred by 12 C.F.R. § 563.39) (dictum).

Likewise, in the analogous context of suits by national bank officers, many state courts have held that, when the National Bank Act applies, federal preemption bars state-law wrongful discharge actions. *E.g., City National Bank v. Brown*, 599 So. 2d 787, 790 (La. Ct. App.) (preemption by National Bank Act), *cert. denied*, 604 So. 2d 999 (La. 1992); *Sargent v. Central National Bank & Trust Co.*, 809 P.2d 1298, 1303 (Okla. Sup. Ct. 1991) (same); *Alegria v. Idaho First National Bank*, 111 Idaho 314, 723 P.2d 858, 860 (1986) (same).

B. The Ninth Circuit Holds Preempted The Kind Of Claim At Issue Here, Creating A Forum-Shopping Problem.

Since the California Court of Appeal's first decision in this case, the federal courts of California have uniformly enforced the preemptive effect of § 563.39. In *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1113 (9th Cir. 1994), the Ninth Circuit rejected the plaintiff's claim of an oral contract with a thrift, holding that, because the plaintiff's oral contract "was neither in writing nor approved by [the thrift's] board of directors . . . [p]ursuant to the express language of 12 C.F.R. § 563.39(a), [plaintiff's] oral agreement is not enforceable."

Even more recently, the court in *Bianco v. H.F. Ahmanson & Co.*, 897 F. Supp. 433 (C.D. Cal. 1995), upheld summary judgment on the state law claims of a 15-year employee who had been discharged by Petitioner Home

Savings. Suing under California law, the employee brought claims for breach of implied contract, breach of implied covenant, and breach of an alleged written contract based on the thrift's employee manual. In holding the employee's claims to be preempted, the court stated:

> California common law which allows for the creation of an implied in fact employment contract through conduct of the parties conflicts with the federal regulation requiring that all employment contracts between a savings association and its employees be in writing and approved specifically by an association's board of directors. Accordingly, said California common law is preempted.

Id. at 438; *see also Pena v. Downey Sav. & Loan Ass'n*, 929 F. Supp. 1308, 1316 (C.D. Cal. 1996) (construing § 563.39(a) as a "preemption defense" to "employment agreements, including implied-in-fact contracts, where a written contract and approval by a board of directors are lacking").

The Ninth Circuit's decision in *Aronson*, and the district court decisions applying it, are significant not only as indicators of a conflict, but also because they raise serious forum-shopping concerns. The outcome of an implied contract suit under California law may depend on whether the employee sues in state or federal court. As this Court has noted for decades, that should not be the case. *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-75 (1938) ("rights . . . [should not] vary according to whether enforcement was sought in the state or in the federal court").

III. THE COURT SHOULD GRANT REVIEW BECAUSE, OTHERWISE, THE FEDERAL QUESTION OF PREEMPTION WILL ESCAPE ANY FEDERAL-COURT REVIEW

This Court's review of state-court preemption cases is vital for a practical reason: otherwise, state courts' determinations of federal preemption issues will evade federal review. That is so because a preemption defense is not a proper basis for removal to federal court, "even if the defense is anticipated in the plaintiff's complaint, and . . . both parties concede that the federal defense is the only question truly at issue." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (state-law claim of breach of employment contract is not removable to federal court, despite the existence of a federal preemption defense); *accord Rivet v. Regions Bank*, ___ U.S. ___, 118 S. Ct. 921, 923 (1998) (a federal defense "is properly made in the state proceeding, subject to this Court's ultimate review").[20]

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[20] For example, in *Pena v. Downey Sav. & Loan Ass'n*, 929 F. Supp. 1308 (C.D. Cal. 1996), the court concluded that, because neither the HOLA nor OTS regulations create a federal cause of action with respect to employment contracts, "[t]he proper course is . . . to remand the action, whereupon [plaintiff's] substantive defense of preemption [based on 12 C.F.R. § 563.39] will be a matter for the state court to determine as part of its trial proceedings." *Id.* at 1316. The court acknowledged that "there are potential problems for sensitive federal . . . regulatory interests inherent in entrusting the adjudication of federal preemption defenses to state courts." *Id.* at 1317. Nevertheless, the court concluded that such concerns are "properly relegated to the province of . . . the Supreme Court in its capacity to

This Court therefore has a special obligation to intervene; this Court is the only one that can correct state courts that decline to apply federal defenses, such as the preemption defense at issue here. This is particularly true where, as here, a state's courts take note of contrary authorities and yet *literally say* that they will not comply with such authority until ordered to so do by this Court. *See* (App. 6.) ("Appellant has failed to establish any change in the law of California on the issue of federal preemption, or any development of law by the United States Supreme Court. Although lower federal courts and courts of other states may have rendered opinions on the issue contrary to that of California State Courts, those opinions are not binding on us.").

Absent federal-court review – review which only this Court can provide – California's state courts (and perhaps those elsewhere)[21] will continue to misinterpret the preemptive effect of 12 C.F.R. § 563.39 to be precisely the opposite of what the majority of other state courts, and

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review state court decisions, and [are] not a matter properly before this court." *Id.*

[21] Cases from at least two other states – New Jersey and Connecticut – also have refused to acknowledge federal preemption of implied employment contract claims. *Cole v. Carteret Sav. Bank*, 224 N.J. Super. 446, 540 A.2d 923, 925 (1988) (finding no preemption; "the very promulgation of 12 C.F.R. § 563.39 bespeaks a concern about employees and their contractual arrangements with the institution"); *Paris v. Northeast Sav. Ass'n*, No. CV 910398144, 1994 Conn. Super. LEXIS 1412, at *21 (June 1, 1994) (citing, with approval, *Hall* and *Cole*). These other cases merely underscore the need for review to resolve the conflict, particularly since cases such as *Paris* rely on the erroneous California cases as precedent.

all federal courts to address the issue in a published decision, have held. Even if this Court for some reason were inclined to affirm the decision of the California Court of Appeal, the Court should grant review to resolve the issue. Because state courts will be the primary forum for the numerous wrongful discharge and related lawsuits by former employees of federal thrifts, review by this Court – whatever its ultimate decision – will serve a vital purpose simply by definitively stating the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

PAUL W. CANE, JR.
Counsel of Record
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PAUL, HASTINGS, JANOFSKY & WALKER LLP

Attorneys for Petitioner
Home Savings of America, FSB

DATED: April 13, 1998

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

MARCELLA T. MAYNARD, Plaintiff and Respondent.	B109801 (Super. Ct. No. GC7209)
v.	(Filed Oct. 16, 1997)
HOME SAVINGS OF AMERICA, Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. J. Michael Byrne, Judge. Affirmed.

Paul, Hastings, Janofsky & Walker, Paul W. Cane, Jr., Kathleen L. McAchran and Franklin R. Wurtzel for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

After plaintiff was terminated from her position as Vice president of defendant Home Savings of America (Home Savings), she sued for breach of implied-in-fact contract and breach of the covenant of good faith and fair dealing. In a prior appeal before this court, we reversed summary judgment in favor of Home Savings, holding that 12 U.S.C. sections 1461-1470 and corresponding federal regulations did not preempt plaintiff's state law claims. On remand, the parties entered into a Stipulated Judgment that plaintiff is entitled to recover $16,000 and also entered into a Stipulated Factual Statement. Home

Savings now appeals the stipulated judgment and raises two issues: (1) the judgment should be reversed and judgment entered in its favor because it had good cause to terminate plaintiff's employment under the stipulated facts; and (2) the judgment should be reversed because federal law preempts plaintiff's state law claims.

FACTUAL AND PROCEDURAL BACKGROUND

According to the Stipulated Factual Statement entered into by the parties in connection with the stipulated judgment, plaintiff worked for defendant, a federal savings association, in various positions for about 27 years, her last position being Vice President and Branch Manager; there was no written employment contract between the parties; after cash losses totaling $280,000 were sustained at her branch in August 1990, May 1991, and June 1991, she was terminated from her employment in October 1991: plaintiff took no part in the disappearance of the cash, and Home Savings never contended otherwise, but an audit revealed that proper cash-reporting procedures were not followed in her branch; Home Savings held plaintiff accountable even though plaintiff contended that the primary responsibility for the inadequate procedures and losses rested with one of her subordinates. After an internal investigation, Home Savings terminated plaintiff's employment because it judged her accountable for the conditions that brought about the losses in her branch.

In May 1992, plaintiff filed a complaint for breach of an implied-in-fact employment contract and breach of the implied covenant of good faith and fair dealing. After

Home Savings answered, it filed a motion for summary judgment or in the alternative summary adjudication of issues, on the ground that plaintiff's claims were preempted by federal law. The trial court granted Home Savings' motion for summary judgment, finding plaintiff's claims were preempted by 12 Code of Federal Regulations, section 563.39. Plaintiff appealed from the summary judgment. In a prior unpublished appellate opinion, we reversed the summary judgment, holding that "While [Home Savings] cites this court to several cases from other jurisdictions which have concluded that 12 Code of Federal Regulations, section 563.39 preempts state law, there are three California cases on the subject, all from this district and all conclude the subject regulation does not preempt California law. [Home Savings] has failed to persuade us that this court should conclude otherwise and we, therefore, reverse the summary judgment." (*Maynard v. Home Savings of America* (Feb. 17, 1994 [B073696] unpub. opn., p. 3.)

Upon remittitur, the parties entered into a Stipulated Judgment and a Stipulated Factual Statement to Accompany Stipulated Judgment. The Stipulated Judgment, which was signed by the trial court and filed on December 23, 1996, provides in pertinent part that "Judgment in the amount of $16,000 shall be entered in this matter . . . in favor of plaintiff Marcella T. Maynard and against defendant [Home Savings], all parties to bear their own costs and attorney's fees," and that Home Savings "shall have the right to appeal the instant judgment, based on the Stipulated Facts filed concurrently herewith." However, "[t]he parties cannot by their stipulation confer jurisdiction upon this court where none

exists." (*Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 Cal.App.4th 631, 639; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373.)

Home Savings filed timely notice of appeal, raising two principal issues: (1) The judgment should be reversed and judgment entered in its favor because it had good cause to terminate Maynard's employment as a matter of law based on the stipulated facts; and (2) the judgment should be reversed because federal law preempts Maynard's claims.

Home Savings' appellate brief acknowledges that our prior appellate decision reversing the summary judgment is law of the case, but asserts, mistakenly, that the doctrine applies only to the trial court. We requested Home Savings to file a letter brief on two issues, which we deem to be dispositive: (1) whether the law of the case doctrine applies to bar our review of the issue of federal preemption; and (2) whether review of the issue of good cause is barred pursuant to the rule that stipulated judgments are not appealable and the circumstances herein do not come within any exception to the rule.

DISCUSSION

Appellant attempts to have us review, for a second time, the issue of whether Maynard's state law claims are preempted by federal law. In addition to citation of recent cases from other jurisdictions recognizing federal preemption, appellant argues that the three California cases rejecting preemption, which were discussed in the prior appeal herein, are wrongly decided. Appellant asks us to reconsider this line of cases and come to a conclusion

different from that in the three cases and from our decision on the prior appeal.[1]

" 'The doctrine of law of the case is this: That where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, . . . and this, although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.' [¶] The principle applies to criminal as well as civil matters [citations], and to decisions of intermediate appellate courts as well as courts of last resort. 'Where a decision upon appeal has been rendered by a District Court of Appeal and the case is returned upon a reversal, and a second appeal comes to this court directly or intermediately, for reasons of policy and convenience, this court generally will not inquire into the merits of said first decision, but will regard it as law of the case.' [Citation.] Application of the rule is now subject to the qualifications that 'the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision.' " (*People v. Shuey* (1975) 13 Cal.3d

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[1] The three California cases discussed in our opinion on the prior appeal herein are *Hall v. Great Western Bank* (1991) 231 Cal.App.3d 713, *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, and *Thomka v. Financial Corp.* (1993) 15 Cal.App.4th 877. The California Supreme Court denied review of *Thomka*.

835, 841-842.) Where the controlling rules of law have been altered or clarified in the interval between the first and second appeal and adherence to the previous decision would result in defeating a just cause, it has been held that the court will not hesitate to reconsider its prior determination. (*Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 759-760.)

Appellant has failed to establish any change in the law of California on the issue of federal preemption, or any development of the law by the United States Supreme Court. Although lower federal courts and courts of other states may have rendered opinions on the issue contrary to that of California State courts, those opinions are not binding on us. Therefore, we conclude that appellant has not convinced us that the doctrine of law of the case does not apply herein. We also concluded that appellant fails to convince us that application of the law of the case doctrine will bring about an injustice in the case before us. The instant case settled, so there is no result on the legal issue of preemption which can be inconsistent with the result of a comparable case brought in federal court. Accordingly, the fact that a similar case brought in federal court may result in a contrary decision on the merits of the preemption issue does not establish that application of law of the case doctrine here would work any injustice to the instant litigants.

With respect to the issue of whether appellant had good cause to terminate Maynard, we conclude that this issue also is not reviewable, but for a different reason. "It is, of course, an elementary rule of appellate procedure that a judgment or order will not be disturbed on an

appeal prosecuted by a party who consented to it. [Citations.] A stipulation such as the one at bench is a consent within the meaning of this rule." (*Atchison, T. & S.F. Ry. Co. v. Hildebrand* (1965) 238 Cal.App.2d 859, 861.) However, consent to the entry of judgment as a formal matter of procedure after an issue has been regularly determined against a party does not deprive him of the right of appeal; in other words, where consent was given merely pro forma to facilitate an appeal, the party will not lose his right to be heard on appeal. (*Kenworthy v. Hadden* (1979) 87 Cal.App.3d 696, 700.) In the instant case, the issue of good cause for Maynard's termination was not submitted to the trial court or determined below. Although the Stipulated Factual Statement sets out some of the background facts concerning Maynard's termination, it does not expressly or by implication contain any resolution or determination of this issue. We thus conclude that the stipulated judgment is not appealable because appellant seeks review of an issue that was not adversely determined against it below.

The requirement that there be an adverse determination of a critical issue by the trial court (*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 817), is also consistent with the general rule that an issue that is not presented to the trial court is deemed waived on appeal. (See *Richmond v. Dart Industries, Inc.*, (1987) 196 Cal.App.3d 869, 875.) If we were to examine the issue now raised on appeal, "we would in effect sanction a practice of allowing a party to keep its legal contentions secret during trial and later pursue a theory on appeal never tendered to the trial court." (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811.) In the instant case,

appellant had the opportunity below to move for summary judgment on the good cause issue, or to go to trial on the issue. Appellant failed to do so, but instead settled the case with Maynard by Stipulated Judgment. There simply remains nothing to be reviewed upon an appeal from such a stipulated judgment. (*Papadakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1387-1388.)

For all of the foregoing reasons, we conclude that the issue of good cause for termination is not reviewable on this appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LILLIE, P.J.

WE CONCUR:

WOODS, J.

NEAL, J.

Second Appellate District, Division Seven, No. B109801
S066042

IN THE SUPREME COURT OF CALIFORNIA

(Filed Jan. 14, 1998)

MARCELLA T. MAYNARD, Respondent

v.

HOME SAVINGS OF AMERICA, Appellant

Respondent's petition for review DENIED.

George
Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

MARCELLA T. MAYNARD, Plaintiff and Appellant, v. HOME SAVINGS OF AMERICA, et al., Defendants and Respondents.	B073696 (SuperCt.No. GC7209) (Filed Feb. 17, 1994)

APPEAL from a judgment of the Superior Court of Los Angeles County. Coleman A. Swart, Judge. Reversed.

Noel Shipman for Plaintiff and Appellant.

Paul, Hastings, Janofsky & Walker and Paul W. Cane, Jr., for Defendants and Respondents.

Marcella T. Maynard appeals from summary judgment and contends the trial court erred in concluding federal regulations preempted her claim.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 15, 1992, Maynard filed a complaint in superior court against Home Savings of America (Home Savings) for breach of an implied in fact employment contract and breach of the implied covenant of good faith and fair dealing.

Home Savings filed an answer to the complaint and thereafter each party filed a motion for summary judgment/summary adjudication. Home Savings' motion was brought on the ground that Maynard's claims were preempted by federal law.

It was undisputed between the parties that Maynard was vice president of Home Savings when she was terminated on October 10, 1991; during her employment, she never had a written, Board-approved employment contract; Home Savings is a federal savings association chartered under Section 5 of the Home Owners' Loan Act, 12 United States Code, sections 1461-1470 and subject to federal regulations promulgated by the Office of Thrift Supervision.

The trial court granted Home Savings' motion for summary judgment finding Maynard's claims were preempted by 12 Code of Federal Regulations, section 563.39.

DISCUSSION

Maynard's contention that the trial court erred in granting summary judgment is well taken. While respondent cites this court to several cases from other jurisdictions which have concluded that 12 Code of Federal

Regulations, section 563.39 preempts state law, there are three California cases on the subject, all from this district and all conclude the subject regulation does not preempt California law. Respondent has failed to persuade us that this court should conclude otherwise and we, therefore, reverse the summary judgment.

Home Savings is a federal savings association chartered under section 5 of the Home Owners' Loan Act and subject to regulations promulgated by the Office of Thrift Supervision. One such regulation is 12 Code of Federal Regulations, section 563.39, which is entitled "Employment contracts" and provides in relevant part: "(a) *General.* A savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors. . . . [¶] (b) *Required provisions.* Each employment contract shall provide that: [¶] (1). The association's board of directors may terminate the officer or employee's employment at any time, but any termination by the association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations

or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract."

In California, the employment relationship is presumptively "at will" but provides remedies for employment termination which contravenes an express or implied agreement for job security, which stems from a "pernicious form of discrimination" or which violates clear, fundamental public policy. (*Hall v. Great Western Bank* (1991) 231 Cal.App.3d 713, 718.)

Under the broad preemption principles set forth by the United States Supreme Court in *Fidelity Federal S. & L. Assn. v. de la Cuesta* (1982) 458 U.S. 141 [73 L.Ed.2d 664, 102 S.Ct. 3014] federal statutes and regulations will preempt conflicting state law. A state law is in conflict when compliance with it is physically impossible in view of the federal mandate or when state law presents an obstacle to the accomplishment and execution of the purpose of Congress. (See *Cole v. Carteret Sav. Bank* (1988) 224 N.J. Super. 446 [540 A.2d 923, 924].)

In 1991, Division Four of this court analyzed relevant state and federal law and concluded that California law did not conflict with the provisions of 12 Code of Federal Regulations, section 563.39. In reaching this conclusion, this court reasoned that the "regulation specifically and unambiguously protects an 'employee's right to compensation or other benefits under the contract' in the event the employee is fired without cause. Thus, the regulation provides protection to employees which is similar to that provided under state law where there exists a valid agreement for job security." (*Hall v. Great Western Bank, supra,* 231 Cal.App.3d at p. 719, fn. omitted.) Division

Four noted further that neither the federal law (12 U.S.C. § 1464) nor the regulation promulgated pursuant to such authority (12 C.F.R. § 563.39) contained "dismiss at pleasure" language. (*Hall v. Great Western Bank, supra,* 231 Cal.App.3d at p. 720.)

In 1992, Division Five of this court in *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 964-965, agreed with the conclusions in *Hall* that California courts had jurisdiction to hear matters arising out of employment contracts with savings associations controlled by the Office of Thrift Supervision and that 12 Code of Federal Regulations, section 563.39 did not preempt California state law.

Most recently, in 1993, this Division, in *Thomka v. Financial Corp.* (1993) 15 Cal.App.4th 877, 885-887, agreed with the conclusions reached in *Hall v. Great Western Bank, supra,* 231 Cal. App.3d at p. 720, and *Honig v. Financial Corp. of America, supra,* 6 Cal.App.4th 960. (See also *Cole v. Carteret Sav. Bank, supra,* 540 A.2d 923.) Based on the foregoing, the summary judgment must be reversed.

DISPOSITION

The judgment is reversed. Appellant shall receive costs on appeal.

NOT TO BE PUBLISHED

LILLIE, P.J.

We concur:

JOHNSON, J.
WOODS (Fred), J.

Second Appellate District, Division Seven,
No. B073696 S038776

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed May 12, 1994)

MARCELLA T. MAYNARD, Appellant

v.

HOME SAVINGS OF AMERICA Et Al., Respondents

Respondents' petition for review DENIED.

LUCAS
Chief Justice

12 C.F.R. § 545.2 Federal preemption.

The regulations in this part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.

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12 C.F.R. § 563.39 Employment contracts.

(a) *General.* A savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors. An association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the association or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) *Required provisions.* Each employment contract shall provide that:

(1) The association's board of directors may terminate the officer or employee's employment at any time, but any termination by the association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the association's affairs by a notice served under section 8 (e)(3) or (g)(1) of Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(3) and (g)(1)) the association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the association may in its discretion (i) pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended, and (ii) reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct

of the association's affairs by an order issued under section 8 (e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(4) or (g)(1)), all obligations of the association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

(4) If the savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting parties: *Provided,* that this paragraph (b)(4) need not be included in any employment contract if prior written approval is secured from the Director or his or her designee.

(5) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary of the continued operation of the association.

(i) By the Director or his or her designee, at the time the Federal Deposit Insurance Corporation or Resolution Trust Corporation enters into an agreement to provide assistance to or on behalf of the association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(ii) By the Director or his or her designee, at the time the Director or his or her designee approves a supervisory merger to resolve problems related to operation of the association or when the association is determined by the Director to be in an unsafe or unsound condition.

Any rights of the parties that have already vested, however, shall not be affected by such action.

¶ 27,107

#RB 27a EXECUTIVE COMPENSATION AND EMPLOYMENT CONTRACTS

March 5, 1993

Summary: This bulletin provides guidance to regulatory personnel for review of compensation provisions and clarifies OTS policy regarding unsafe and unsound practices relating to executive compensation and employment contracts contained in 12 C.F.R. §§ 563.39 and 563.161. This Bulletin further clarifies a number of issues that arose in connection with Regulatory Bulletin (RB) 27 and re-emphasizes OTS policy to defer to healthy thrifts' boards of directors in compensation matters. RB 27, dated November 8, 1991, is rescinded with the issuance of this Bulletin.

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The Director of the Office of Thrift Supervision (OTS) has authority under § 4(a)(1) of the Home Owners' Loan Act (HOLA) to provide for the safe and sound operation of savings associations. Section 8(b)(6) of the Federal Deposit Insurance Act authorizes each regulatory agency to take actions to limit the terms of, or to prohibit an insured depository institution from entering into or making payments under, any contracts between an insured depository institution and an institution-affiliated party that constitute an unsafe or unsound banking practice.

General policy. The OTS will ordinarily give healthy institutions deference concerning compensation levels and compensation arrangements for their directors and senior executive officers. All MACRO factors, not just

capital, will be considered in the review of employment contracts and other compensation arrangement.

As a general rule, the OTS will defer to the savings association's board of directors concerning executive compensation arrangements, provided the following conditions are met:

- The savings association is not a problem association,
- The compensation arrangements do not present significant safety or soundness concerns that could lead to material financial loss or damage to the association, and [sic]

The OTS requires the board of directors of each association to annually review all employment contracts and compensation arrangements for senior executive officers and directors and to document their justification and approval in the board minutes. Directors who have a personal interest in the compensation arrangements should not participate in the deliberations on or vote on the arrangements. Employment contracts may only be renewed or extended upon explicit review and approval by the board of directors.

Prior approval requirement. All problem associations should submit employment contracts for senior executive officers and directors to the Regional Director for prior review. The Regional Director may extend this requirement to other employees of the savings association as well. Compensation at problem institutions requires regulatory scrutiny on a case-by-case basis in order to balance a problem institution's need to lower operating

expenses against the need to provide a higher than normal level of compensation to attract or retain qualified management.

Definitions. "Compensation" includes any payment of money or provision of any other thing of value in consideration of employment, including, without limitation, base salary, commissions, bonuses, pension and profit sharing plans, severance payments, retirement, director or committee fees, fringe benefits, [and] payment of expense items without accountability or business purpose or that do not meet the IRS requirements for deductibility by the association. The grant or exercise of stock options will not ordinarily be considered compensation unless they are so material in amount or conditioned upon factors that result in incentives that cause supervisory concerns.

A "senior executive officer" includes any individual who exercises significant influence over, or participates in major policymaking decisions of, a savings association without regard to title, salary, or compensation. The term includes but is not limited to the president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment officer, general counsel, or their functional equivalents.

A "director" is any individual who is a member of the board of directors of the association or of any subsidiary of the association.

An "employment contract" is any agreement, intended to be legally enforceable that materially affects the terms and conditions of a person's employment.

A "problem" association is defined as an association that: (1) has a composite MACRO rating of 4 or 5; (2) is undercapitalized under prompt corrective action standards; (3) is subject to a capital directive or a cease and desist order, a consent order, or a formal written agreement, relating to the safety and soundness or financial viability of the savings association, unless otherwise informed in writing by the OTS; or (4) has been notified in writing by the OTS that it has been designated a problem association or an association in troubled condition.

Existing contracts. The OTS will review, comment, and take appropriate action to correct existing employment contracts that are deemed to be unsafe or unsound.

The OTS will not generally require changes to preexisting contracts in health institutions. Contract provisions, however, that raise significant safety and soundness concerns will be subject to examination comment or formal enforcement actions until the contract is terminated or modified. The OTS may, on safety and soundness grounds, insist that the board replace unacceptable managers and use its best efforts to renegotiate employment contracts that are excessively burdensome on the institution.

Unsafe or unsound practices. The following guidelines are illustrative, not exhaustive, examples of compensation provisions considered unsafe or unsound. Other compensation provisions may also be objectionable depending on individual circumstances. These guidelines are based on safety and soundness concerns that are especially important for problem associations. Regulators

must use judgment in the application of the guidelines, taking into account the condition of the institution, the reason for the provision and the materiality of the provision.

Regulators should review compensation provisions in problem associations under these guidelines (1) during examinations, (2) in conjunction with applications that contain compensation arrangements, and (3) when employment contracts and compensation payments are submitted for review by problem associations.

- Compensation arrangements that provide incentives contrary to the safe and sound operation of the association. For example, compensation based primarily on short-term operating results may encourage unreasonable risk-taking to achieve short-term profits. Compensation tied to current operating results should be closely monitored by the board of directors.

- Compensation arrangements that provide for compensation that significantly exceeds compensation paid to persons with similar responsibilities and duties in other insured institutions of similar size, in similar locations, and under similar circumstances, including health and profitability.

- Contracts that contain automatic renewals or extensions of the contract without providing explicit review and approval by the board of directors.

- Contracts that provide for an excessive term. As a general matter, a one-year term is not objectionable; a term exceeding three years is generally objectionable.

- Total compensation paid out upon the departure of an employee, regardless of the reason, that exceeds three

times the employee's average annual compensation.[1] Total compensation must include payments for the remaining contract term, if applicable, as well as any severance payments. Average annual compensation should be based on the most recent five taxable years.

- Contracts that do not adequately reflect or define the duties and responsibilities of the employee.
- Compensation programs (including deferred compensation/retirement/insurance) for independent directors that are not commensurate with their duties, or that jeopardize their independence, such as vesting requirements that would require an independent director to forfeit previously accrued amounts if they did not serve for a minimum number of years.
- Contracts that are collateralized or otherwise guaranteed by the savings association, unless the contract terms provide that the contract is unenforceable if the association becomes a problem association, or unless the contract is approved by the Regional Director. Guarantees provided solely by the holding company are permissible.
- Contracts that provide for employer reimbursement of costs incurred by employees seeking to enforce employment contract terms in the absence of legal judgment or settlement.
- Change-in-control provisions that provide for immediate vesting, particularly for problem institutions.
- Generally, any contract that requires payment upon the voluntary resignation of the employee will be examined carefully to determine whether it is unsafe and unsound.

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[1] In the case of termination for cause, however, no payments should be made.

RB 27a does not apply to employment contracts or other compensation arrangements between a holding company and a holding company executive. Employment contracts between a holding company and a thrift executive are not covered unless such contract or arrangement is likely to adversely affect the financial or managerial condition of the association. If applicable, separate contracts should be maintained between a thrift executive and the association and the thrift executive and the holding company.

The following "golden parachute" provision should be included in new and renewed employment contracts: "Any payments made to the employee pursuant to this agreement, or otherwise, are subject to and conditioned upon their compliance with 12 USC § 1828(k) and any regulations promulgated thereunder."

1990 OTS LEXIS 53 printed in FULL format.

Office of Thrift Supervision

1990 OTS LEXIS 53

July 3, 1990

SUBJECT: [*1] Employment Contracts
90/CS-46

Dear Text Omitted

This is in response to your letter to the Secretary of the Federal Home Loan Bank Board ("FHLBB") requesting assistance in the interpretation of 12 C.F.R. Sections 545.122 and 563.39. We apologize for the delay in our response.

Specifically, the two questions that you have asked are the following:

1. Is it correct that, as to rank and file employees for whom no written contract exists, the regulations in question do not apply?

2. Is the requirement that all such written contracts be terminable "at any time" intended to abrogate any state rights which may accompany at-will employment? Or alternatively, was such a provision merely intended to preclude contracts of employment for a stated term?

Although we are unaware of the specific facts and the specific context for which these questions were asked, we can respond generally to the queries. However, it should be noted that specific facts, circumstances, or conditions might require different conclusions. n1

n1 It should also be noted that the wording of Section 545.122 that you quote is inaccurate. The current Section (and the Section at the time of your opinion request) states: "A Federal association, upon specific approval of its board of directors, may enter into employment contracts with its officers an [sic] other employees in accordance with Section 563.39 of this Chapter[sic]. [*2]

Discussion

The Office of Thrift Supervision ("OTS"), formerly the FHLBB, generally permits institutions to enter into employment contracts with their officers and other employees in accordance with specific regulatory requirements. These regulatory requirements are contained in 12 C.F.R. Section 563.39. n2

n2 The section applicable to federal institutions, 12 C.F.R. Section 545.121, specifically permits employment contracts in accordance with Section 563.39.

In response to your first question, in our view, the provisions of Section 563.39 would apply to all employees regardless of whether or not they have actual written employment contracts. The purpose of the regulation is generally to protect institutions from unsafe and unsound practices arising in connection with employment relationships. In order to prevent circumvention of the intent of this regulation, it is our belief that its provisions should apply whether there is a written or tacit employment contractual relationship.

In response to your second question, we are further of the view that the requirement in Section 12 C.F.R.

563.39(b)(1) that the termination of the officer or employee's employment be terminated [*3] "at any time" would supercede any contrary and conflicting state law provisions governing at-will employment. Specifically stated in the regulation, however, is the exception that, unless the termination is for cause, the dismissal shall not prejudice the officer or employee's right to compensation or other benefits under the contract. These compensation and other benefits rights could be provided for under state law, and the intent of the regulation is not to abrogate these specific state rights. Also, in response to the second part of this question, this particular regulatory provision does not preclude contracts of employment for a stated term, although, depending upon the particular facts and circumstances, supervisory objection may be taken to provisions of a particular employment contract, including objection based upon an excessive term of the contract. We suggest that you discuss terms of particular contracts with the OTS supervisory staff responsible for the particular savings association to which the contract pertains.

If you have any further questions or comments on this matter, please contact Valerie J. Lithotomos, Staff Attorney, Corporate and Securities Division, [*4] at (202) 906-6439.

Very truly yours,

(Signed)
Julie L. Williams
Deputy Chief Counsel